



Developments in Employment Laws For Healthcare Providers & All Employers

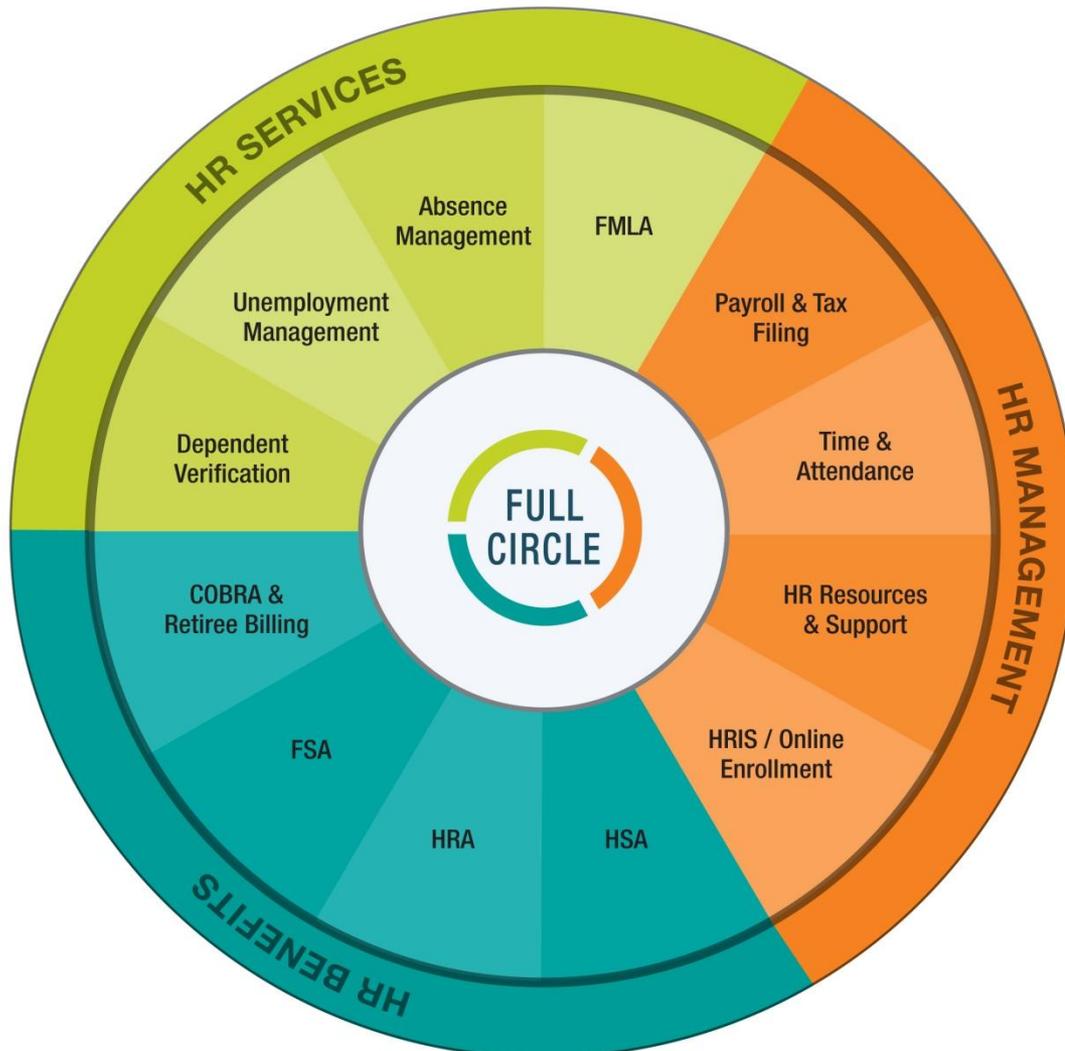
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Introduction



Any employer in the United States faces difficulties enough in running a business, making a payroll and satisfying customers.

- Complying with state & federal laws complicates tasks significantly
- Laws, court opinions and agency enforcement priorities dictate how much employees have to be paid, as well as:
 - What an employer can and cannot demand of workers
 - What rights workers have to challenge management's decisions
 - How benefits are provided and structured.

How do Changes Occur?



Employment and labor laws compliance issues arise in three ways:

- New legislation at the state, federal and local level
- Different enforcement priorities by state and federal government agencies which are largely dictated by the political parties in control and, thus, subject to immediate change
- Court decisions interpreting laws and imposing obligations on employers trying to manage a workplace.

How do Changes Occur?



Of the three ways that changes occur, new enforcement priorities offer the most significant challenge to employers. A new administration with a different view of government's role will look at established workplace practices and decide they no longer are acceptable.

Current driving forces behind these changes:

- Organized labor, which has a great influence in Washington, D.C. and some state governments in traditionally pro-labor states like Illinois
- Constant need for government agencies to generate revenue without raising taxes by legislation.

The Employment Process



- In presenting these issues and changes, it's useful to see how they apply to the process of employment.
- Employers need to be aware that every aspect of the employment relationship is subject to scrutiny from government agencies either on their own initiative or in response to employee complaints.
- This begins from the moment you decide to post a job, through application and hiring and while people are on your payroll and afterward.

This is not legal advice, however, as every situation is different and the factors that apply to one employer may not apply to another in a different state or business. Please consider these to be general guidelines.



Background Checks

- “Consumer Reporting Agency” – Their use is governed by the Fair Credit Reporting Act and its implementing regulations.
- Responsibility for enforcement transferred from Federal Trade Commission (FTC) to the Consumer Financial Protection Bureau, which will be far more aggressive in its duties than the FTC
- CFPC has made it clear that they intend to act as a protector of people’s rights in this area to see that employers make full disclosure to applicants

Hiring Employees (Continued)



Employers who use background checks, including credit reports:

- Must obtain a signed authorization form from the applicant (separate from application form). Don't try to do this yourself. Get a form from an employment lawyer or the firm that conducts your background checks.
 - Must notify applicants of their rights in the event employment is denied based on in the information contained in the report.
- Give applicants a separate Summary of Rights form, informing them that if employment is denied (adverse action) the employer will:
 - Provide a copy of the report received from the consumer agency
 - The name and address of the reporting agency
 - The toll free number the employee can use to contact the agency and correct any errors
 - Tell all applicants that your company has no control over the content of background checks and cannot make any changes.



Criminal Convictions History

- For many years employers felt free to eliminate any candidate who had a criminal conviction, regardless of when it occurred and the type of crime
- Equal Employment Opportunity Commission (EEOC) has criticized these policies, claiming:
 - They are discriminatory
 - Minority candidates tend to have more convictions, thus are denied employment opportunities without an adequate explanation by the employer of the potential harm.
 - Under no circumstances may an employer use arrest records.

Hiring Employees (Continued)



The EEOC has declared that employers who use criminal conviction screening must do the following:

- Employers must inform applicants that if they list a criminal conviction on the application that they are not automatically disqualified from consideration
- Applicants must be told they should give information about the nature of the conviction, when and what occurred, and any other mitigating circumstances
- Employers must state they will consider all the circumstances surround the conviction before making a hiring decision
- Make sure your employment application says all of the above

Hiring Employees (Continued)



Important Note:

The EEOC now requires employers to show a “business necessity” for rejecting an applicant based solely on a conviction. If the person was convicted of a minor offense twenty years ago and has a stable history of employment since, such “business necessity” will be hard to prove. Some states, notably Illinois, have passed laws similar to the EEOC enforcement guidelines. If you are in compliance with the EEOC regulations you will almost certainly comply with state law but it pays to check your jurisdiction.

Credit Check Legislation



- Last week a bill was introduced to the U.S. Congress that would prohibit employers from asking for or using credit reports for applicants or employees.
- Illinois has already enacted similar legislation but allows employers to obtain credit reports when applicants or employees will have access to financial information or company trade secrets. Your state may have a similar law. Make sure you check.
- Likelihood of federal legislation passing is not considered high at this point but stay tuned.

LGBT Protection



Although there is no federal law that extends legal employment discrimination protection to lesbian, gay, bisexual, or transgendered employees, the EEOC has announced it will include those categories under the definition of sex discrimination under Title VII of the Civil Rights Act of 1964 or as a perceived disability under the Americans with Disabilities Act.

This is a significant stretch in their enforcement authority and may not survive a court challenge. However, it's reality at this point.

LGBT Protection (Continued)



What should an employer do?

- Amend your company EEO policy to include sexual orientation as a protected category just like race, sex, disability, etc.
- Be certain to include transgendered employees within the definition of sexual orientation
- Include LGBT protection under any sexual harassment policy so that references to an employee's sexual orientation, lifestyle, manner of dress or behavior are prohibited. This is important since harassment is the most likely source of employee complaints.

After the Employee is on the Job



The following slides all **refer to after the employee is on the job.** A wide range of topics/circumstances will be covered.

Use of Independent Contractors



By far the area of greatest scrutiny by state and federal agencies.

- Many employers chose to treat workers on their premises as independent contractors to save money during the recent recession

Using contractors saves on insurance, benefits, workers compensation coverage and the matching Social Security contribution.

Reclassifying independent contractors as employees is a large source of revenue for government agencies and, therefore, the area in which they will scrutinize an employer's use of such workers most closely.

Use of Independent Contractors



- The following government agencies all have the ability to reclassify your workers as employees and issues back pay awards, fines and penalties;
- **Federal and State**
 - Internal Revenue Service
 - Social Security Administration
 - Department of Labor
 - Equal Employment Opportunity Commission
 - National Labor Relations Board
 - OSHA

State Workers Compensation Commissions

Unemployment Benefits Agency

State Department of Labor

State Department of Revenue

Use of Independent Contractors



- Having a written contract in which the workers agree to be treated as contractors is meaningless.
- Microsoft, FedEx and many others had lengthy agreements in which the contractors specifically waived the rights to benefits and employment status. It made no difference to the Department of Labor
- Government agencies will look closely at the “economic reality” of the relationship.
- If a business directs or controls a contractor’s daily activities the government agency will declare the IC an employee.
- Do not blithely assume that because someone is happy now with their contractor status that they will be in the future. If they are injured on the job or apply for unemployment benefits the burden will be on the business to prove they were not employees. This is not easy to do.

Use of Independent Contractors



What to Look For:

If your business has a number of people regularly on the premises working alongside employees, and who are directed in their daily activities by company management, who wear company issued uniforms or have business cards, then they **need to be reclassified as employees.**

Otherwise, your business could be liable for:

- Back taxes, benefits, unpaid contributions to Social Security and unemployment benefits funds
- Uninsured workers' compensation claims

Don't ignore this issue. The potential exposure is too great.

Keep in mind one of my maxims: If it were easy to classify workers as independent contractors, no one would have employees.

Use of Independent Contractors



If you decide to reclassify you may have to pay some back taxes for two years. The IRS has an amnesty program currently in effect that allows employers to come forward but speak to your accountant and an employment lawyer before you expose your business to IRS scrutiny.

Refer to [BASIC's previous webinars](#) to learn how to determine whether your independent contractors are really employees.

The National Labor Relations Board



The National Labor Relations Board enforces a law known as the National Labor Relations Act (NLRA) which primarily deals with union elections, collective bargaining agreement negotiations, picketing and the unfair labor practice charges which occur during those events.

Non-unionized businesses had little to fear from the NLRB until four years ago. Since then the agency has reinterpreted its mandate to include any employer, unionized or not. They have cracked down hard on any employer they consider to be limiting workers' rights.

The National Labor Relations Board



NLRB has expanded its enforcement authority into claims against non-union employers when those employers act in a way that limits employees' "protected, concerted activities" under the NLRA:

- "Protected, concerted activities" is defined as the right of employees to discuss the terms and conditions of their employment with co-workers or act collectively to organize or bargain over working conditions, etc, including:
 - Pay, benefits, work rules, management communications and employee discipline
 - Union activities, organizing campaigns or representation

It is illegal for an employer to limit those rights or to retaliate against employees who exercise them.

The National Labor Relations Board



Your company personnel policy manual must contain a provision that tells employees they have the right to do the things protected under the NLRA without fear of discipline. Employees may openly talk about:

- What they earn
- Any special benefits arrangements
- Personnel records or disciplinary actions
- Organizing activities including their rights to join a union, bargain collectively and challenge management decisions.
- The NLRB is also seeking to require employers to post a notice of these rights in the workplace. This will happen sooner than later.

The National Labor Relations Board



The NLRB has become particularly aggressive in investigating and charging employers who discipline employees for posting derogatory comments on **social media** outlets about their employers. Please note that protected, concerted activities only extend to communication with co-workers or potential employee representatives. **It does not cover postings meant to be seen by the general public.**

Employers may not have policies that prohibit any “protected, concerted activities.”

Refer to [BASIC's previous webinars](#) to learn more about social media in the workplace.

Unpaid Overtime Pay



Unpaid overtime pay has become another source of revenue for state and federal governments and an area of explosive growth for employee lawsuits. Often characterized as “wage theft,” even the most diligent employer may find itself subjected to the scrutiny of the US Department of Labor over classification of employees as exempt or non-exempt or calculation of hours worked.

You must also be aware of whether your state has provisions more beneficial to employees than the federal Fair Labor Standards Act in the calculation of overtime.

Unpaid Overtime Pay



Steps your business should take to insulate itself from potential liability:

- Review the employment classification of exempt employees. Do they meet the exclusions for managerial, professional, administrative, outside sales or computer technology employees?
- Are your exempt employees paid a regular weekly “salary” regardless of the number of hours worked or productivity? If not, your company may not be able to claim the exclusion from OT since it does not meet the “salary” test under the Fair Labor Standards Act.
- Is a large percentage of your workforce classified as “exempt” salaried? This is a red flag to government agencies. Take steps to review the classifications and make any changes necessary.

Unpaid Overtime Pay



Steps your business should take to insulate itself from potential liability:

- Review closely how your company accounts for hours worked for non-exempt employees. Do all employees sign off on their weekly time card? Do they certify on that time card that those are all the hours they've worked? Does your company or individual supervisors allow or require employees to work through lunch break or perform duties when they are "off the clock," such as stopping at the Post Office on the way home.
- Do any of the non-exempt employees work from home? If so, how does the company keep track of their hours and productivity? Do they log on and check in periodically? Do these same employees keep a time record which is used to calculate their regular pay and overtime?

Unpaid Overtime Pay



Steps your business should take to insulate itself from potential liability:

- Does **anyone** at the company tell employees they must work extra hours with no compensation? Do not allow this. It is illegal and will subject the employer to significant liability.
- Does your company use “comp time” instead of paying overtime premium pay? If so, you must stop this practice immediately even if the employees like it. The only entity allowed to offer comp time to employees legally is the federal government.

Minimum Wage Changes



- Whether the federal minimum wage will be increased as President Obama proposes is open to question. Current federal minimum wage is \$7.25.
- As of January 1, 2013, Arizona, Colorado, Florida, Missouri, Montana, Ohio, Oregon, Rhode Island, Vermont and Washington state have raised their minimum wages. Check your jurisdictions for the amounts.
- The California cities of San Francisco and San Jose increased the minimum wage to \$10.55 and \$10.00 respectively.
- Minimum wage investigations by government agencies are unusual unless your employees receive much of their compensation through tips. Restaurants, bars and taxi companies should talk to your accountant or employment lawyer to ensure compliance.

Time Off for Nursing Mothers



Time off for nursing mothers to express breast milk while they are working is now guaranteed by the Patient Protection and Affordable Care Act. Employers with more than fifty employees must provide a “reasonable” break time and an appropriate place for a woman to use a breast pump to extract milk

Time Off for Nursing Mothers



The EEOC has also indicated that it will take an aggressive stance in protecting the rights of pregnant employees or applicants. Treat all pregnant employees as you would any other worker until such time as they notify you of the need for accommodation for their condition or pregnancy leave. Never raise the issue of whether pregnant employees intend to return to work and never discipline a pregnant employee without independent verifiable documentation.

Possible Legislation



Predicting what laws the US Congress or state legislatures will pass is a fool's errand. I gave a speech five years ago to a group of business owners and predicted then that comprehensive immigration reform would be passed by the US Congress within a few months. Needless to say, I was wrong then and I may be wrong now. However, never one to be deterred by past mistakes, here are some thoughts on what laws are likely to be passed and what form they may take.



Immigration Reform



Immigration reform is coming. Business is demanding the right to hire more qualified people from around the world and to retain the workers already here. Politicians and unions view immigration as a means of growing their bases of constituents. I believe that any legislation will have to include employers as part of the process of determining eligibility and to enforce the law with respect to applicants.

Immigration Reform



Predictions as to what employers will have to do:

- The law will require most employers to use the federal E Verify system of determining employment eligibility. Currently only federal contractors must train their employees and use the system exclusively.
- As E Verify becomes more prevalent, the use of the Form I-9 will be phased out.
- Employees who are not here legally will be required to enlist support of their employers to help in their application process for legal citizenship. This will require employers to complete forms attesting to the employee's work history with the company as well as the prospects for continuing employment.

Immigration Reform



Predictions as to what employers will have to do:

- Recent news stories have also discussed the possibility of a federal ID card which will be conclusive proof of eligibility.
- Note, I view any of the above developments as positive for employers in that the use of E verify or federal ID card would be prima facie evidence of a company's compliance with the immigration law and, thus, insulate the employer from liability.
- It should also end the instances of employers having to respond to SSA on "no match" letters for workers with falsified Social Security numbers.

The Paycheck Fairness Act



The Paycheck Fairness Act was mentioned briefly by President Obama in his State of the Union speech as a legislative priority of his administration. This bill expands on the Equal Pay Act which mandates equal pay for men and women for jobs that are substantially similar. This law would make it legal for employees to openly discuss their pay with each other without fear of reprisal for violating work rules. Please note the previous discussion on the National Labor Relations Board which already guarantees this right as a “protected, concerted activity.”

The Paycheck Fairness Act



The EPA allows for differentiation in salary for seniority, experience or a “factor other than sex.” The Paycheck Fairness Act shifts the burden on to the employer to justify wage differentials for night shifts, weekends, etc.

This bill has been introduced twice in the last four years and has failed both times. Whether it can pass now is anyone’s guess. If your company is diligent about complying with the Equal Pay Act this legislation should not impose much of a burden and should not be an area of concern.

Paid Sick Leave



Paid Sick Leave is now required in limited jurisdictions throughout the United States, notably municipalities like San Francisco. It has been a legislative priority of organized labor for many years. As the Obama administration's second term approaches its final years there may be a push on by unions and workers rights group to revive the law. This is particularly true if the Democrats can regain control of the House and retain the Senate in 2014.

Paid Sick Leave



My guess is it would take the form of an amendment to the Family and Medical Leave Act and would require employers to pay for a certain number of days of leave under the FMLA. Considering how much abuse and fraud is currently involved in employees taking unpaid FMLA time, imagine how that would increase when employees could be paid for that time. That's one of the strongest arguments against the law.

The business lobby has worked hard to defeat this legislation before and will do so again, I am certain.

Social Media



Illinois has passed a law that prohibits employers from asking applicants for their social media access codes. This law strikes me as a solution in search of a problem since no client or business I am familiar with ever asks for this information. Your jurisdiction may have a similar law. Check with your state department of labor to see what they say.

Social Media



Please note that there is nothing to prevent an employer from looking at an applicant or employee's Facebook, LinkedIn or other social media page when the person leaves access open to anyone. Likewise, information posted on those pages may be used in making decisions with respect to a person's employment, provided that the information doesn't fall within the definition of "protected, concerted activities." Information turned up in Google or Bing searches is also a legitimate basis for employment decisions.

An applicant who reveals trade secrets about a prior employer on SM is not an employee you want.

Social Media



A recent case out of Detroit concerned an employee of a health care provider who was on FMLA leave for what she described as “excruciating” back pain. While on FMLA time off she posted pictures of herself on Facebook under the heading Mexican Vacation, riding jet skis, drinking beer and cradling babies. These pictures were brought to the attention of the employer by her co-workers who were upset since they were doing her job while she was supposed to be dealing with her “serious health condition.” The employer fired her for FMLA fraud and abuse. The woman had the nerve to file a lawsuit but the court upheld the employer’s decision as based on an “honest belief” due to the pictures which were available to anyone.

Note to employees: If you’re stupid enough to post pictures of yourself that are available to anyone, be prepared to accept the consequences. Employers will not be held liable.



Questions



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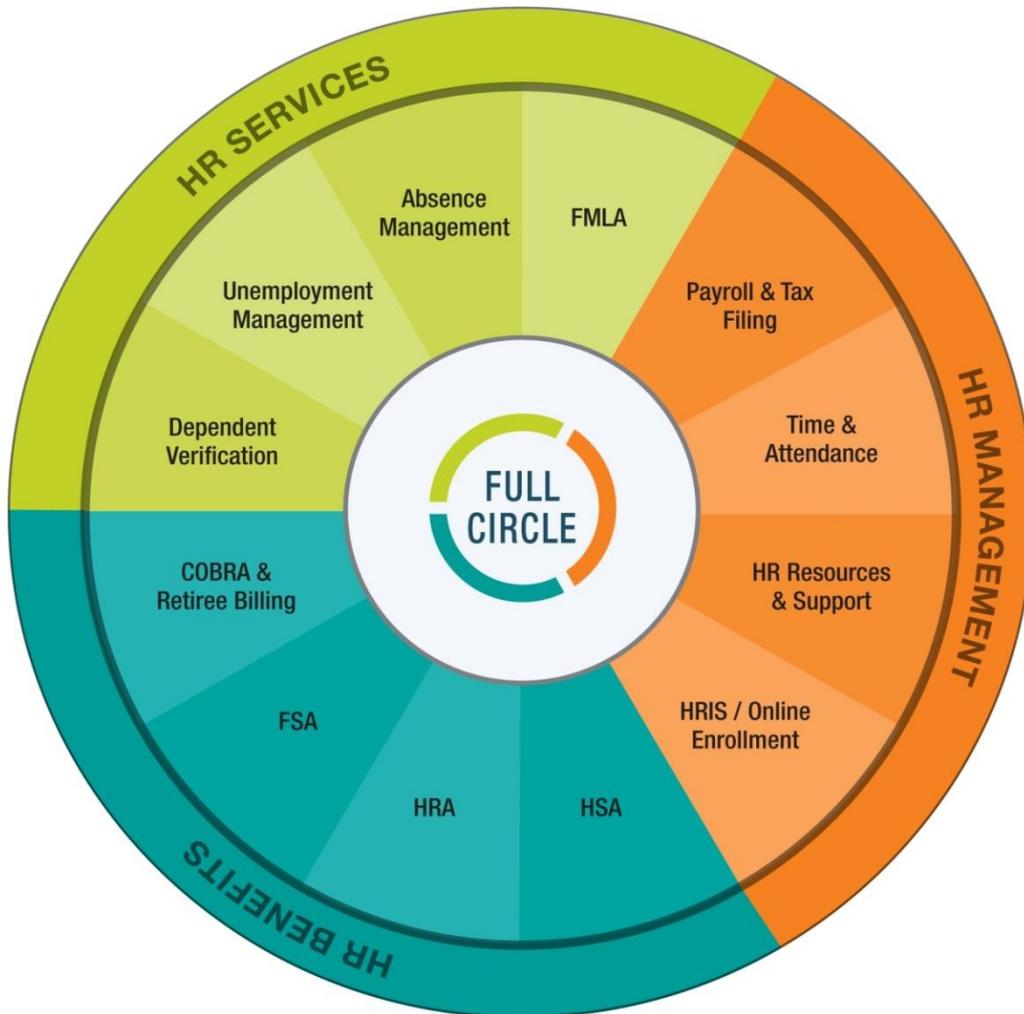
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